In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-641

RAY K. BULLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-642

CORNELIUS J. KEHOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners successfully moved, after their trial had commenced, to dismiss the indictment against them on the ground that it failed to state an offense. Petitioners were reindicted. The district court dismissed that indictment, the United States appealed, and the court of appeals reversed and remanded (516 F.2d 78; Pet. Nos. 75-641 and 75-642 Apps. A). Petitioners contend that the Double Jeopardy Clause precludes further prosecution relating to the subject matter of the first indictment.

1. The court of appeals found that petitioners' delay in moving to dismiss the indictment was a deliberate, tactical

decision on their part. This case therefore presents the second question reserved in *Serfass* v. *United States*, 420 U.S. 377, 394: whether a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial, and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense, can be retried if the district court rules in his favor when the post-jeopardy motion is made and terminates his trial.

For the reasons stated by the court of appeals, we believe that its resolution of this question is correct. Cases of this sort are most closely analogous to mistrials declared because of defects in the indictment. See *Illinois* v. *Somerville*, 410 U.S. 458, in which a mistrial was declared over a defendant's objection because of a defect in the indictment. Where, as here, defendants actively sought the termination of their trial because of a technical defect that was (or should have been) apparent on the face of the indictment, it should be permissible to retry them, just as it was permissible to retry Somerville, if the interests of justice so require.[1] Where, as here, a defendant deliberately postpones making his motion until after jeopardy has

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[1]There is no merit to petitioner Bullock's argument (Pet. No. 75-641, pp. 6-13) that the initial district court decision dismissing the indictment was an acquittal on the facts. The district court explicitly noted that it was resolving solely the legal issue concerning the sufficiency of the indictment. It stated: "This is a criminal case in which the contents of an indictment must necessarily be scrutinized with great care" (Pet. No. 75-641 App. 63) and that "the Government has not met its burden of proof in demonstrating that the indictment recites an offense for which prosecution may be brought" (*ibid.*). The court of appeals properly held that the court "was clearly discussing only the legal sufficiency of the indictment and not the facts of the case before him" (*id.* at 26). The passage upon which petitioner Bullock relies (Pet. No. 75-641, p. 7) was characterized by the court of appeals as "ambiguous" (Pet. No. 75-641 App. 27). The court of appeals held that the district court had simply " 'accepted as true for purposes of [the] motion' " (*ibid.*) certain evidence offered by the prosecution. It did not resolve any facts either for or against petitioner Bullock.

attached, we submit that the interests of justice strongly support a second trial. The court of appeals properly applied in this case the balancing analysis used in the mistrial cases.

2. We have sought review of a decision concerning the first question reserved in *Serfass, supra*, 420 U.S. at 394: whether the Double Jeopardy Clause precludes an appeal from a mid-trial order terminating a prosecution on the basis of facts outside the indictment. *United States* v. *Robbins*, 510 F.2d 301 (C.A. 6), petition for a writ of certiorari pending, No. 75-67. Our supplemental memorandum in *Robbins* observes that the instant case "strongly supports the position we have taken and conflicts in principle with" *Robbins* (Supp. Memo. 1).[2]

If certiorari is granted in *Robbins*, and if our argument is accepted in that case, then the correctness of the judgment in the instant case follows directly. If the judgment in the defendant's favor in *Robbins* were affirmed, we still would submit that the instant case was properly decided, because of petitioners' deliberate delay in making their motions. While it would be feasible to hold this case pending disposition of *Robbins*, we believe, on balance, that it would be better for the Court to grant the petitions in this case and to set it for argument in tandem with *Robbins*. Such a course would enable the Court to consider simultaneously both of the questions reserved in *Serfass* and to analyze more fully all of the considerations

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[2]Copies of our petition and supplemental memorandum in *Robbins* are being furnished to counsel for petitioners.

involved in retrials after mid-trial terminations before the case has been submitted to the jury.[3]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[3]If certiorari is denied in *Robbins* it should be denied in this case as well, both because of the correctness of the decision below and the absence of a direct conflict on the particular point decided in the instant case.